STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL PARHAM,

Defendant-Appellant.

UNPUBLISHED
August 16, 2002

No. 233205
Wayne Circuit Court
LC No. 00-005802

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(1)(a), on an aiding and abetting theory, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for the murder conviction and sentenced to two years for the felony-firearm. Defendant appeals as of right. We affirm.

The prosecution alleged that on August 29, 1999, defendant aided companion Leo Kennedy[1] in the murder of Anthony "Tone" Mercer because of a neighborhood drug trade rivalry. According to the prosecution, early that morning, defendant and Kennedy drove to a club in Detroit, intending to kill Mercer. A witness testified that when Mercer emerged from the club, the parties argued and defendant threatened Mercer's life. Then, the witness said, defendant handed Kennedy a gun, and Kennedy fatally shot Mercer four times in the chest and abdomen. The defense contended that defendant was not the shooter and did not assist Kennedy in the murder.

At trial, after obtaining both counsel's express consent, the trial court closed the courtroom to all persons except for defendant's and the victim's families. The court stated that closing the trial was appropriate because some of the spectators had discussed the case in the presence of some jury members, and because the spectators seemed to be observing the trial merely for entertainment. Defense counsel did not object.

[1] Defendant and Kennedy were tried jointly with separate juries. Kennedy was also convicted of first-degree murder.

According to the record, the trial court gave the jury the proper instruction that aiding and abetting includes the element that "before or during the crime, the defendant did something to assist in the commission of the crime." CJI2d 8.1.[2] During trial deliberations, the jury asked the judge whether the phrase "during the crime" included "time after the shots were fired." After obtaining both counsel's express consent, the trial court reread the official instruction to the jury, and told them that whether defendant's conduct after the shots were fired qualified as occurring "during" the crime was a fact question for them to determine. Defense counsel did not object to this instruction.

First, defendant argues that the trial court violated his right to due process when the court improperly instructed the jury regarding the definition of aiding and abetting. See US Const, Am V, VI, XIV; 1963 Const, art 1, §§ 17, 20. However, because defense counsel expressly assented to the instruction, defendant waived this issue, extinguishing any possible error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Second, defendant argues that defense counsel's failure to object to the aiding and abetting instruction constituted ineffective assistance of counsel. See US Const, Am VI; Const 1963, art 1, § 20. We disagree. We will consider this issue only to the extent that the record reveals the alleged mistakes because this claim was not preceded by an evidentiary hearing or motion for new trial before the trial court. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Generally, this constitutional question is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must ordinarily show the following: (1) that under prevailing professional norms, counsel's performance was below an objective standard of reasonableness; (2) that but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different; and (3) that as a result, the proceedings were fundamentally unfair or unreliable. *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), on remand 839 F2d 1401 (1988), after remand 900 F2d 1511 (1990); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant bears a heavy burden of overcoming the presumption of effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant claims that his trial counsel's waiver of objection to the instruction was constitutionally ineffective. However, the record reveals that the trial court simply reiterated and briefly explained the definition of aiding and abetting stated in the instruction itself. Because the instruction was proper, any objection would have been meritless, counsel was not required to object. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Thus, counsel's performance was not objectively unreasonable. *Toma*, *supra* at 302.

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[2] MCL 767.39, the statute abolishing the distinction between an accessory and a principal, states: "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or *procures, counsels, aids, or abets* in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense" (emphasis added).

Third, defendant argues that the trial court's decision to clear the courtroom of all spectators except for defendant's and the victim's families denied defendant's right to a public trial. See US Const Am VI; Const 1963, art 1, § 20. Again, because defense counsel expressly assented to this action, defendant waived the issue, extinguishing any possible error. *Carter*, *supra* at 215-216.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell